February 27, 2004

Country-of-Origin Labeling Program
Room 2092-S
Agricultural Marketing Service, USDA
STOP 0249
1400 Independence Ave., SW
Washington, DC 20250-0249

Re: Docket No. LS-03-04. Proposed Rule: Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts.

Dear Sir or Madam:

This letter responds to the Agricultural Marketing Service's (AMS or the agency) October 30, 2003, request for public comment regarding the above-referenced proposed rule. The American Meat Institute (AMI) is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products. Our member companies account for more than 90 percent of U.S. output of these products.

Promulgation of Regulations Applicable to Meat Should be Held in Abeyance

AMI opposes mandatory country-of-origin labeling (COL), favoring instead a voluntary approach. However, the law now contemplates the implementation of mandatory country-of-origin labeling of certain meat products effective September 30, 2006 – more than 31 months from now.[1] Given the extended time before COL becomes mandatory, it is premature, legally and practically, for AMS to promulgate such rules. In fact, premature promulgation of such regulations likely will adversely affect their implementation and could result in the Agricultural Marketing Service (AMS

[1] Sec. 208 of the 2002 Supplemental Appropriations Act (P.L. 107-206).

or the agency) being forced to revise those regulations before the 2006 deadline.

Section 284 of the COL law enacted in 2002 provides that "[N]ot later than September 30, 2004, the Secretary shall promulgate such regulations as are necessary to implement this subtitle." Section 285 further provides that "[T]his subtitle shall apply to the retail sale of a covered commodity beginning September 30, 2004."

The September 30, 2004, deadline was established by Congress so that AMS would have regulations in place by the time covered commodities were required to bear COL declarations in retail stores. Absent such regulations, retailers, and those who provide covered commodities to them, would be left without guidance regarding how to comply with some aspects of the law, *e.g.*, whether the product is exempt because it is a component of a "processed food item." However, with the amendment to section 285 substituting 2006 for 2004, promulgating regulations affecting meat by September 30, 2004 is no longer "necessary to implement this subtitle." Congress could not and did not need to amend section 284 because the effective COL date for wild fish and farm-raised fish is still September 30, 2004. Thus, there remains a need for some regulations to be promulgated by that date, but only those affecting wild fish and farm-raised fish and the COL issues applicable to those commodities.

Not only is promulgation of regulations for meat and other products by September 30, 2004, not "necessary," it is premature and likely will be counterproductive. Other than labeling required by the Federal Food, Drug, and Cosmetic Act, the Federal Meat Inspection Act, and the Poultry Products Inspection Act for imported consumer ready products, there is little, if any, COL for food currently ongoing in the market.[2] Given the absence of any voluntary COL experience, promulgation of rules more than two years before they would be administered could lead to the creation of an ineffective regulatory system in September 2006. Although the marketing and production circumstances are different for each of the covered commodity

[2] The reasons for this may be several and are discussed in a recent Economic Research Service paper, *Country-of-Origin Labeling: Theory and Observation*. ERS, USDA WRS-04-02, January 2004. This paper succinctly articulates the various economic theories as to why there are few, if any, incentives for firms to engage in country-of-origin labeling and why consumers enjoy little, if any, benefits from such labeling.

groups, AMS likely will be able to learn significantly from the experiences it has regarding COL for fish. In that regard, the lessons learned from administering that system should be incorporated into regulations that can be applied to a broader array of products. Should AMS fail to benefit from the lessons available regarding COL for fish, the agency would be forced to amend its rules, wasting agency resources and causing considerable confusion within the affected industry and government regulators. For these reasons, AMS should not move to promulgate regulations affecting meat.

Although mandatory COL for meat product is more than 31 months away, absent a statutory change repealing mandatory COL, many AMI members ultimately will be subject to the regulatory scrutiny imposed by labeling requirements promulgated by AMS. Accordingly, AMI submits the following comments concerning the substantive elements of the proposed rule to ease the burden this misguided public policy would impose not only on the meatpacking industry, but producers and consumers as well.[3]

[3] An additional reason for delaying development of a rule is the underlying intellectual dishonesty of mandatory COL. Current law effectively dictates that the costs of mandatory COL will be allocated differently than if a voluntary system were implemented. In that regard, under a voluntary system and hypothesizing that consumers will pay a premium for U.S.-origin goods, as mandatory COL proponents do, domestic producers would bear the costs of labeling. However, under mandatory COL those burdens largely fall to processors, distributors, and retailers, particularly if they deal in foreign products. In short, mandatory COL is a scheme by some U.S. producers to make imports less attractive and to shift the cost of the labeling system to others in the production and distribution chain. Such an ill-conceived public policy should not be developed or implemented until necessary.

The Proposed Rule's Concept of "Processed Food Item" is ambiguous and overly broad.

The statute exempts from COL a "covered commodity" if that commodity is an ingredient in a "processed food item." Specifically, section 281(2)(B) provides, in pertinent part, the following:

> EXCLUSIONS--The term "covered commodity" does not include an item described in subparagraph (A) if the item is an ingredient in a processed food item.

The scope of this exclusion from labeling is one of the single most important considerations facing AMS as it develops a final rule.

This issue presents a challenge to AMS, particularly given the absence of statutory guidance regarding what constitutes a "processed food item." However, the concepts articulated in the proposed rule do nothing to alleviate the uncertainty, and the problems such uncertainty creates, that meat companies and their customers will face as they attempt to determine whether a product must bear COL. Indeed, the proposed rule exacerbates problems AMI identified in its comments regarding the voluntary guidelines. In that regard, AMI submits the following suggestions for the agency's consideration.

As AMI demonstrated in previously submitted comments, the simplest, fairest, and most logical approach to resolving this issue is to define "processed food item" more broadly than was done in the guidelines and more broadly than is set forth in the proposed rule. To that end, a covered commodity should not have to bear country-of-origin labeling if the product in which the covered commodity is included bears an ingredient declaration. Establishing a bright line standard through this "ingredient declaration" approach is not inconsistent with the principles underlying COL and will benefit all interested parties such as those in the production and distribution chain, consumers, as well as government regulators.

Specifically, this "ingredient declaration" standard would eliminate the substantial uncertainty that will assuredly exist under the principles articulated in the proposed rule's "one of two options" approach to defining a processed food item. Assuming the rule is promulgated as proposed, meat

companies and their customers will struggle to determine whether (1) a product they produce, receive, or offer for sale has "undergone a physical or chemical change, and has a character that is different from that of the covered commodity" or (2) the item is "derived from a covered commodity that has been combined with other covered commodities; or other substantive food components … resulting in a distinct retail item that is no longer marketed as covered commodity,…." [4]

This definition creates ample opportunity for uncertainty for packers and processors, as well as their customers and uncertainty leads to additional, unnecessary costs. The food production system is increasingly innovative, as consumers demand more convenience in the foods they purchase, and that trend almost certainly will continue. That innovation, in turn, will create uncertainty for packers and retailers as to whether many of the new products provided will be deemed to be a processed food item, and therefore invoking the exclusion from COL for the covered commodities included in those products. That uncertainty ultimately will lead to COL of products not requiring such labeling and, conversely, products that should be labeled not bearing required labeling – with both circumstances yielding added and unnecessary costs to the food production and distribution system. Absent a bright line standard, AMS will struggle to articulate whether certain products must bear COL and that struggle will continue and grow as new products are developed and marketed to meet changing consumer demand.

The subjectivity involved in administering the concepts in the proposal is particularly problematic in an enforcement context. Specifically, AMS will find itself in the business of making determinations as to whether a particular product has a "character different from that of the covered commodity" or if it has been combined with enough other covered commodities to qualify as a processed food item. Thereafter, AMS will face an insurmountable challenge as agency officials attempt to disseminate those determinations, not only to AMS enforcement officials but also to the legion of state officials who will be asked to assist in auditing and enforcement efforts. Without clearer direction from AMS through the rules promulgated, the agency is at risk of creating opportunities for government officials to make conflicting determinations about whether products must bear COL. Indeed, an attempt by AMS to pursue penalties in such circumstances could

[4] 68 *Fed. Reg.* at 61982 (October 30, 2003).

be challenged on the grounds that the regulations are void for vagueness. For the above-stated reasons, AMS should adopt the "bright line" rule that a product bearing an ingredient declaration need not bear country-of-origin labeling.

The Proposed Rule Misplaces Certain Responsibilities for Labeling Accuracy

The proposed rule contains a recordkeeping provision that is problematic and inequitable to the meatpacking industry. Specifically, proposed section 60.400(b)(1) would establish supplier responsibilities such that "(1) Any person engaged in the business of supplying a covered commodity to a retailer, whether directly or indirectly, must make available information to the buyer about the country of origin …."[5] The proposal also provides that "the supplier of a covered commodity that is responsible for initiating a country of origin declaration, which in the case of beef, lamb, and pork is the meat packing facility, and, if applicable, designation of wild or farm-raised, must possess or have legal access to records that substantiate that claim."[6]

Concerning the meat industry, these provisions apparently ignore a fundamental consideration: meatpackers do not own the vast majority of livestock slaughtered and packers generally are not in a position to determine with certainty where an animal is born or raised. This provision would, in effect, subject some companies in the meatpacking industry to the civil penalties established by the law, notwithstanding the fact that those companies do not have first hand knowledge regarding the veracity of the information provided by livestock suppliers. What the proposal does not establish is whether a meat packer would be entitled to rely on the veracity of the records provided, or in the alternative kept, by the livestock supplier. To that end, if the agency intends to require that initiating suppliers, such as meat packers, must possess or have access to records to substantiate country-of-origin information provided to them, AMS should recognize, by regulation, that the initiating supplier is entitled to rely, absent a compelling reason to question their veracity, on records provided (or kept).

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[5] 60 *Fed. Reg.* 61984 (October 30, 2003.)
[6] *Id.*

Livestock suppliers, however, should not be permitted simply to provide an affidavit or declaration as to country-of-origin of livestock. Indeed, quite the contrary should be true because the lesser the quality of the records provided or available for review, the more probable that a meat packer might question their legitimacy or truthfulness. If a livestock supplier has or provides substantive records purporting to represent the country-of-origin of livestock sold to the meat packer, that packer should be entitled to rely on those records without fear of civil penalty if those records are fraudulent or in error. Only if the agency can demonstrate that the packer knew the records were false or wrong should the packer face the prospect of civil penalties. Such an administrative position would be consistent with the approach consistently advanced by AMS in numerous public meetings and apparently envisioned by the agency with respect to other suppliers of covered commodities along the distribution chain.[7]

The Alphabetical Listing for Blended Products is Still Unworkable and Unnecessary.

The proposed rule would amend the ill-conceived "predominance of weight" concept incorporated in the voluntary guidelines published in 2002. Although an improvement, the alphabetical listing proposal would still result in meat packers and processors incurring significant costs for blended products such as ground beef. Thus, if a ground beef processor uses trimmings from U.S. cattle, Australian frozen beef, as well as trimmings from cattle that were born in Mexico, sold as feeder cattle, and then finished and slaughtered in the United States, the product label would read "Ground beef: Product of Australia; Imported from Mexico and Raised and Slaughtered in the United States; Product of the United States."

This proposed provision is an improvement from the guidelines in that the processor would be able to use the same label for both the 80 percent and 90 percent lean products, even though different formulations might be used to produce two different products, so long as the same sources were used to make both products. The matrix of potential labels remains considerable, however, even with this change, and could still lead to economic inefficiencies by encouraging firms not to use combinations of inputs that result in product formulated in the most cost effective manner. AMS should allow labeling that identifies possible sources of inputs, similar to the manner in which the

[7] See, *e.g.*, proposed 7 CFR sec. 60.400(b)(2)-(4).

Food and Drug Administration and Food Safety and Inspection Service allow labeling regarding oils used in the production of a wide array of foods.

Country-of-Origin Labeling will be a Costly Process and the Proposed Rule Underestimates the Costs to the Meat Sector.

In the proposed rule, AMS correctly estimated that the benefits associated with this rule are likely to be negligible. In contrast, the agency estimated first-year incremental cost for growers, producers, processors, wholesalers, and retailers to range from $582 million to $3.9 billion, with estimated costs to the U.S. economy in higher food prices and reduced food production in the 10th year after implementation of the rule ranges from $138 million to $596 million.[8] The agency also found little evidence that consumers are willing to pay more for products bearing COL and little evidence that consumers would buy more food items bearing the Product of the U.S. because of this rule. The absence of voluntary programs for such labeling indicates that consumers do not have a strong preference for country-of-origin. Finally, AMS concluded that the evidence does not suggest that American producers will receive sufficiently higher prices for their products to cover the labeling, recordkeeping, and other related costs.

AMI agrees with many of these conclusions. As AMI demonstrated in previously submitted comments, implementing and administering a COL scheme for meat products will be very costly, from both capital expenditure and ongoing operational perspectives. In that regard, although AMS correctly characterized the rule's benefits as *de minimis*, it appears that the agency may have underestimated the costs, at least with respect to the meat sector.

1. Capital Expenditures in Slaughter Plants will Exceed Agency Estimates

Meat packing facilities will have to employ livestock and product segregation systems so that meat derived from an "all American" animal, *i.e.* born, raised, and processed in the U.S., is not mixed with meat requiring labeling declaring the product to be, for example, beef derived from an animal "born in the United States, raised in Canada and slaughtered in the United

[8] These numbers do not quantify some costs of the proposed rule, such as the cost of the rule after the first year, or the cost of supply disruptions or other "lead-time" issues.

States," and similarly separate from an animal "born in Canada, raised and slaughtered in the United States." The meat from these animals of different origins must be kept separate as the carcasses proceed down the line, enter the coolers, as the meat subsequently proceeds through the fabrication process, as the trimmings are sent to the grinding operation, and ultimately as the meat, in this case beef, is stored and distributed.

There are a number of realistic labeling permutations derived from the matrix of economic circumstances that represent where cattle and hogs are born, raised, and slaughtered. Those circumstances, which have evolved to enhance economic efficiencies, will (1) require cattle and hog slaughter and processing plants to establish systems that separate at the plant the animals and the meat derived from those animals, (2) force plants to kill animals with different affiliations on specific shifts or specific days, which still requires segregation, or (3) force plants to kill only one "type" of animal to avoid certain segregation and labeling issues.

Accommodating the notable differences in how livestock are raised and processed in North America will require significant capital expenditures by many plants. Reliable estimates are that it could cost as much as $50 million to reconfigure a large cattle slaughter and beef processing plant to comply with mandatory COL. Smaller cattle slaughter and processing facilities may spend from approximately $20 million to $30 million per plant. Based on these estimates, capital expenditures to reconfigure the largest cattle slaughter facilities could be as much as $1.32 billion. That value does not include the vast majority of the more than 800 plants that slaughter cattle in the United States, many of whom also will have to spend money to segregate cattle.

Similarly, estimates of capital costs for hog slaughter and processing operations range from $12 million to $25 million. Based on these per plant estimates, the pork industry could incur costs of approximately $1.1 billion to accommodate mandatory country-of-origin labeling. Thus, capital expenditures to enable compliance at the larger cattle and hog slaughter and processing plants could reach $2.4 billion or more, notably higher than the $1.7 billion AMS estimated the cost would be for the entire meat sector.

Indeed, even if half the plants identified elect to buy only animals that may be characterized as "All American," costs could still exceed $1 billion.[9]

In addition to the capital costs that will be incurred at livestock slaughter and processing plants, many meat-processing facilities do not slaughter cattle, but produce ground beef and other fresh whole muscle meat products that could be subject to country-of-origin labeling. These facilities buy significant amounts of frozen imported beef and buy large amounts of beef trimmings from slaughter facilities, perhaps as many as 10 to 20 suppliers.[10] Cost estimates for developing a segregation system to accommodate the inputs with a vast array of labeling permutations, which is made more problematic by the proposed requirement regarding alphabetical listing for blended products range from $1 to $3 million. These considerations affect a large number of federal and state inspected grinding operations, which then are placed in the conundrum of limiting their suppliers, in turn precluding their ability to engage in least cost formulation practices or implementing costly segregation systems to comply with the nuances of mandatory COL. Compounding this problem is that fact that many of these operations are very small.

2. Operating Costs Will Rise Significantly with Mandatory COL

AMS did not capture the ongoing operational costs in its economic analysis. However, in addition to capital investments, meat packers and processors will incur ongoing costs attendant to implementing COL. Those who provide covered commodities to retailers must also provide accurate information, regardless of whether the plant sells only "All American" or elects to buy livestock or meat with different country affiliations. In either circumstance, a recordkeeping system must be implemented and administered so that the purchaser of the covered commodity, as well as the government, can verify labeling accuracy. In that regard, all meat packers, of every size who sell or want to sell a covered commodity to retailers will have to administer a recordkeeping system for country-of-origin labeling.

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[9] These figures do not include costs that likely would be incurred at some lamb slaughter operations.

[10] Also significant is the fact that many slaughter plants buy trimmings from other slaughter plants in order to be able to meet customer demands. Thus, a "dedicated" slaughter plant would only be able to buy trimmings from other, similarly dedicated plants rather than having a wider array of plants from which to purchase inputs.

Estimates of operational costs for a cattle slaughterer and processor are at least $5 per head, and maybe as much as $10 per head, to provide accurate country-of-origin labeling information. For hogs, the cost estimate is between $1.25 and $2 per head. These values involve not only recordkeeping, but also other costs related to segregation (other than capital expenditures), additional labeling, storage, and other factors.[11] Using these values, annual costs at the slaughter plant will be $208.2 million for beef and $144.9 million for pork – a total of approximately $353 million annually.[12] These operational costs will likely be incurred by virtually all slaughter operations because, although some meat produced at a slaughter plant is used in products that are not covered commodities, virtually all livestock slaughter operations either sell some products to retailers or would like to be able to sell to retailers. Because the obligation to provide accurate information as the product's country-of-origin exists regardless of the nature of the animal, *i.e.*, "All American" or other, virtually every slaughter plant will have to have a recordkeeping and audit system.

As with capital expenditures, slaughter operations are not the only meat processor that will incur operations costs. "Stand alone" beef grinding operations will also bear costs as they provide, for example, coarse ground beef or case ready ground beef to retailers or others in the meat distribution chain. For example, a ground beef producing establishment that procures beef trimmings (inputs) from five, 10, or more different suppliers and produces several different products, *i.e.* ground beef with different lean percentages, 93, 85, 80, and 70 percent, could be forced to abandon the economic efficiencies inherent in least cost formulation or will be forced to carry an extensive labeling inventory, as well incurring the costs involved in shutting down operations while new labeling is rolled out for each different product. Estimates from several AMI members engaged in these types of operations are that complying with mandatory COL will impose costs of between 6-9 cents per pound.

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[11] The labeling problem is compounded when the product quality factor, *i.e.* the grading system, is added to the calculus.

[12] The $353 million does not include costs attendant to approximately 975,000 veal calves slaughtered at federal plants nor the almost 3.1 million lambs slaughtered under federal inspection. This value also does not include the costs that would be borne by state inspected facilities that sell a covered commodity. State inspected plants are not exempt from providing accurate information about the country-of-origin of such products.

Finally, given the practical problems and additional costs associated with segregating livestock and products within a meat packing and processing establishment based on animal origin, mandatory COL may drive some multi-plant firms to dedicate certain establishments to the production of "U.S." products and other establishments to the slaughter of animals and the production of meat products that do not qualify for that label. If such a segregation system develops, a simple, meaningful, and appropriate label needs to be developed for meat products that are covered commodities and do not qualify for the "U.S." label so that those "multi-national" plants are not subject to an overwhelming competitive disadvantage.

World Trade Organization Obligations Must be Considered in Crafting a Rule.

Proponents of mandatory COL are trying to force segregation and other compliance requirements up through the processing and distribution system. In effect, mandatory COL proponents advocate a labeling system that has packers, wholesalers, and retailers that buy and sell both domestic and imported livestock or products to incur costs attendant to segregating inventory, recordkeeping, and implementing compliance systems. These burdens could encourage some or many of those companies to limit sources of livestock or meat, possibly to only domestic suppliers. To the extent that any rule promulgated by AMS encourages or requires products of foreign origin to be treated differently from U.S. products, issues of World Trade Organization compliance arise under the "national treatment" principle. Accordingly, any regulation developed by AMS must scrupulously avoid any such problems.

The American Meat Institute appreciates the opportunity to submit these comments. If you have any questions regarding the information provided in these comments or anything else regarding this issue, please contact me.

Sincerely,

Mark Dopp
Senior Vice President, Regulatory
Affairs and General Counsel